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Attorneys for Employer Road Works, Inc.

# UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

ROAD WORKS, INC.,

Employer,

and

SOUTHERN CALIFORNIA DISTRICT COUNCIL OF LABORERS AND ITS AFFILIATED LOCAL LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 1184,

Petitioner.

CASE NO. 21-RC-21306

BRIEF IN SUPPORT OF EXCEPTIONS TO HEARING OFFICER'S REPORT AND RECOMMENDATIONS [Board Rules & Regulations Section 102.69]

# I. INTRODUCTION

On December 16, 2011, Region 21 Hearing Officer John J. Hatem issued the Hearing Officer's Report and Recommendations ("Report") in the above-captioned matter. The case involves an election in which the tally of ballots showed six votes in favor of the Petitioning Union, four votes against the petitioning Union and there were three determinative challenged ballots. The Hearing Officer properly determined that challenged voter Mike Wessel was an eligible voter and not, as the petitioning Union contended, a supervisor under the Act. The Hearing Officer also properly found that employee Javier Castro had resigned his employment and was not an eligible voter, thus his challenged ballot should not be counted. The Hearing Officer erred, however, in ruling that Daniel Blocker was properly excluded and his challenged

ballot should not be counted. The Petitioner-Union argued at the time of the election that Daniel Blocker was both a relative of management and a confidential employee. Then, in a change of position at hearing, the Petitioner-Union argued exclusively that Daniel Blocker had resigned his employment with the Employer, presenting no evidence on the original grounds for challenge.

The Employer disputes and excepts to the ruling that Daniel Blocker resigned his employment and, therefore, lost eligibility to vote. The corroborated hearing evidence goes to the contrary result.

The evidence presented at hearing demonstrates that Daniel Blocker has worked as a field employee for the Employer at all relevant points in time and made clear his intention to perform future work for the Employer. This is in stark contrast with challenged voter Javier Castro, who made clear his resignation of employment and his entering into a new business venture would prevent him from coming to work with Road Works in the future. The Hearing Officer properly rejected Castro's challenged ballot based upon his abundantly clear relinquishment of future employment opportunities with Road Works.<sup>1</sup>

## II. FACTS

Daniel Blocker's eligibility was originally challenged by the Petitioner-Union as a relative of management and a confidential employee. At hearing, the Union failed to address its original challenge and instead took an inconsistent position introducing a new and untimely challenge at the hearing that Daniel Blocker quit.<sup>2</sup>

Despite hearing testimony from multiple witnesses on Daniel Blocker's employment and eligibility to vote, the Hearing Officer overlooked the evidence and concluded that Daniel

<sup>&</sup>lt;sup>1</sup> The Hearing Officer's disparate logic is evident in comparing Castro to Blocker on what it takes to establish a quit. There being no clear and unmistakable surrender of future employment opportunity by Blocker, this should in no way be not enough to waive the right to cast a determinative vote in this small unit. Metropolitan Edison v. NLRB, 460 US 693 (1983).

Failure to provide advance notice of evidentiary support for their original challenge evidences the weakness and lack of merit in the Union's position. This new challenge is untimely and was waived when the Union clearly and unmistakably failed to present it when Daniel came to vote. See Metropolitan Edison Co. v. NLRB, above. No evidence was presented to establish original basis of challenge, which the Hearing Officer properly required. However, the Hearing Officer erred by allowing the Petitioner-Union to pursue new arguments that Daniel Blocker quit his employment at Road Works.

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Blocker resigned his employment at Road Works (Report pp. 6-10).<sup>3</sup>

Daniel Blocker has worked as a crew laborer at all points in time, sealing and blowing pavement cracks like all other laborers. (Tr. 201:14-17, 244:16-17, 246:11-247:4.) He has no term of employment which differs from other crew member employees eligible to vote in the election. He has what may be the lowest ranking employee status on the crews in which he works. (Tr. 246:11-247:4.)

The corroborated evidence is consistent and undisputed that Daniel lives in San Diego. never advised Employer of a quit, and has consistently communicated with Employer about employment opportunities in the San Diego area. (Tr. 143:21-144:1, 202:3-4, 221:8-18, 229:5-9, 245:4-246:5.) Daniel has also held a part-time position of employment at a pizza parlor (not a "bar" as suggested by the Hearing Officer) but has not given up his employment with Employer, especially since he continued to actively pursue employment with Employer throughout this period of time. (Tr. 245:4-246:5, 247:25-248:9.)

There is no comparison to Javier Castro, properly ruled ineligible, who resigned his employment and last worked for Employer in March 2011. (Tr. 42:2-3, 44:8-45:18, 144:8-19, 199:19-201:11, 260:19-262:3.) As evidenced by testimony, Castro advised several people that he was leaving Employer to work with a new company he was forming. (Tr. 199:21-201:11, 144:10-17, 260:19-262:3.) It is a box company completely distinct from the side job of photography Castro held over previous years of employment at Road Works. (Tr. 65:16-24, 260:19-262:3.)

### III. ARGUMENT

A. Daniel Blocker did not quit employment at Road Works. He is eligible and should be counted. (Exceptions 1, 2, 4, and 5)

Nowhere in the evidence is there an evident severance of Daniel Blocker's employment relationship. Daniel Blocker's employment relationship, like many in the construction industry.

<sup>&</sup>lt;sup>3</sup> In footnote 4 of the Report, the Hearing Officer claims to make credibility resolutions based upon evidence, including undisputed evidence, to reject evidence which is incredible or has little or no probative value and "omitted matter is considered either irrelevant or superfluous." In the same footnote 4, the Hearing Officer states that certain testimony is only partially credited. Nowhere in discussing Daniel Blocker is the Hearing Officer's analysis of evidence or credibility clear.

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is project to project. All indications are that Daniel Blocker awaited work in San Diego County and that he has a reasonable expectation of such work in the future. That projects might have been delayed, by weeks or even months, is of no matter if the work is forthcoming. Daniel Blocker continues working for Road Works.

The factual disparity between Daniel and challenged (and ineligible) voter Javier Castro is pronounced. Castro confirmed he was leaving Road Works and that he had a different business venture in his future.

The Board's Daniel/Steiny (from Daniel Construction Co., 133 NLRB 264 (1961) and Steiny & Co., 308 NLRB 1323 (1992)) voter eligibility formula indicates that eligibility for construction industry elections may be based upon active employment or days worked. Reasonable expectation of recall is a part of active employment. Termination for cause or a voluntary quit will end eligibility but they must be proven to strip someone of eligibility. The evidence is ample that Daniel Blocker has worked for Road Works and expected further work. His expectation is enough to demonstrate voter eligibility under Daniel/Steiny standards.

The Board found reasonable expectation of continued employment in a Daniel/Steiny election a viable ground for hearing and conclusion of voter eligibility, challenged vote in the Signet Testing Labs case 330 NLRB 1 (1999).

That the Hearing Officer broadly concluded that Daniel Blocker lacks voter eligibility for failure to work a certain number of days under Daniel/Steiny further demonstrates the folly and misapplication of Board law to these facts and Daniel Blocker's secret ballot.

That the Hearing Officer concluded Daniel Blocker lost voter eligibility by working in a "bar" further demonstrates the folly and misapplication of Board law including the Daniel/Steiny formula. Employees have not lost rights under Section 7, including to cast a secret ballot as an eligible voter, because they might also work for another employer (Tualatin Electric, 319 NLRB 1237 (1995) - salts entitled to remedy and no moonlighting policy unlawful in unfair labor practice case setting; Acme Mattress Co., 97 NLRB 1439, 1443 (1952) and U.S. Telefactors Corp., 300 NLRB 720, 722 (1990) cited in Board Compliance Manual Section 10554.4 - cannot prejudice employee's back-pay recovery in unfair labor practice case because of supplemental

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employment preexisting unfair labor practice) or because the construction industry's ebbs and flows of project work prevent continued employment (Daniel/Steiny cases). The Report's finding on Daniel Blocker prejudices him because his second job and supplemental employment is used to deny him the right to vote. The Hearing Officer's ruling on Daniel Blocker must be harmonized with other Board law to ensure Daniel Blocker's vote is counted, rather than disenfranchised.

The Hearing Officer, however, would have Daniel Blocker forfeit his Section 7 rights in a way which also deprives all Road Works employees of their Section 7 rights to vote on representation. This is because what happens with Blocker determines the outcome on this question concerning representation for other voters.

The Hearing Officer's failure to give weight to corroborated evidence on Daniel's employment is significant and material error.

Moreover, the discussion of <u>Daniel/Steiny</u> voter eligibility formula is irrelevant in terms of Daniel's eligibility. Daniel Blocker was on payroll at the voter eligibility cutoff date in the election agreement. He retains an expectation of continued and future employment. (Tr. 245:15-246:5, 252:15-20.) See <u>L & B Cooling</u>, 267 NLRB 1 (1983); P. G. Gray, 128 NLRB 1026 (1960); Musgrave Mfg. Co., 124 NLRB 258 (1959); California Vegetable Concentrate, 137 NLRB 1779 (1962); Baumer Foods, 190 NLRB 690 (1971) all of which held employees who have a reasonable expectation of reemployment in the foreseeable future are included in the bargaining unit. Accordingly, Daniel is an eligible voter.

For the reasons which make Javier Castro's quit so evident and overt, Daniel Blocker's continued employment is evident. For the reasons which make it appropriate for the Hearing Officer to reject the Petitioner-Union's gamesmanship in trying to change grounds for challenge of Mike Wessel (Report p. 24, footnote 6), the Hearing Officer should have seen through the gamesmanship in the Petitioner-Union's late effort to change grounds and attack Daniel Blocker's eligibility on the basis of a quit.

Daniel Blocker's vote should be counted.

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# B. The Hearing Officer's ruling on Daniel Blocker has a domino effect which prejudices Mike Wessel and other eligible voters at Road Works in voting whether to have representation. (Exceptions 3 and 4)

By ruling Daniel Blocker to have quit and to be an ineligible voter, the Hearing Officer prevents Mike Wessel's vote from being counted. Mike Wessel was also challenged in an effort to disenfranchise him. The challenge to his vote on supervisory status, an inherently thornier issue given the complexity of Section 2(11), was properly overruled.

It is unconscionable that Wessel's vote is not counted and included in the ballot count. In fact, his ballot is held hostage to the erroneous ruling on Daniel Blocker's eligibility and ballot.

Because neither Daniel Blocker's vote nor Mike Wessel's eligible vote is included in the ballot count, the 6-4 tally of ballots is incomplete and flawed and may well be 6-6. Despite the Hearing Officer's findings, the Petitioner-Union does not win a tie vote and should not be certified as a majority representative.

To effectuate the intent of all eligible voters, it is critical to include all of the valid votes cast. The Hearing Officer's Report would do away with that to certify the Petitioner-Union. The Board should not countenance a result which is repugnant to the will of the eligible majority of voters and votes.

The Board should order that Daniel Blocker's and Mike Wessel's votes both be opened and counted so that an accurate certification (of representative or result) follows. A failure to do so would scrap Section 7 rights of choice on union representation. By disenfranchising Daniel Blocker and Mike Wessel, whose votes are determinative, the Hearing Officer has, through the Report, affected the election result. In an objections context that is not appropriate. Wolverine Dispatch, Inc., 312 NLRB 796 (1996) (Election set aside when number of voters possibly disenfranchised could affect election results).

In this challenged ballot context the same rule should apply. No election result here should be certified without counting Daniel Blocker's and Mike Wessel's votes.

The Hearing Officer's utter failure to explain findings on Daniel Blocker, in the face of contrary corroborated evidence, is material error which flaws the findings on Daniel Blocker.

(Exception 5)

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For the reasons stated above, the facts on Daniel Blocker do not comport with the The Hearing Officer's findings and credibility resolutions go against the clear preponderance of relevant evidence and are incorrect. It is appropriate for the Board to disregard the Hearing Officer's findings. Hallandale Rehabilitation and Convalescent Center, 313 NLRB 835 (1994); Murphy Brothers, Inc., 261 NLRB 416 (1982).

### IV. CONCLUSION

Daniel Blocker is an employee of Road Works, Inc. whose employment never ended and in fact continues. The Hearing Officer ignored relevant evidence and law going directly to this point which disenfranchises both determinative challenged voters Daniel Blocker and Mike Wessel in this small construction industry unit, to ignore the will of the majority and essentially, to hand a Certification of Representation to the Petitioner-Union. Region 21 should be ordered to open both ballots, and then certify to those election results.

Respectfully submitted.

DATED: December 29, 2011

ATKINSON, ANDELSON, ŁOYA, KUUD & ROMO By: Thomas A. Lenz Attorneys for Employer Road Works, Inc.

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### PROOF OF SERVICE

(Code Civ. Proc. § 1013a(3))

# STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and am not a party to the within action; my business address is 12800 Center Court Drive. Suite 300, Cerritos, CA 90703.

On December 29, 2011, I served the following document(s) described as \* BRIEF IN **EXCEPTIONS** TO HEARING OFFICER'S REPORT **RECOMMENDATIONS** \* on the interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

NLRB - Executive Secretary	E-filing	Via NLRB site
Bruce Hill Acting Regional Director John Hatem, Hearing Officer NLRB Region 21 888 So. Figueroa Street, 9th Floor Los Angeles, CA 90017-5449	Via mail/efiling	Tel: 213/894-5200 Fax: 213/894-2778
CARLOS R. PEREZ, ESQ. Reich, Adell & Cvitan 3550 Wilshire Boulevard, Suite 2000 Los Angeles, California 90010	Via Mail & e-mail	Tel: 213/386-3860 Fax: 714/834-0762 carlosp@rac-law.com Attorneys for Petitioner
Client	Via e-mail	

- $\boxtimes$ BY MAIL: I am readily familiar with the firm's practice of collection and processing correspondence for mailing. The envelope(s) was deposited with the U.S. postal service that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.
- BY FAX: I sent such document by use of facsimile. Facsimile confirmation was received for recipients' facsimile number indicated above pursuant to California Rules of Court Rule 2008(e). The facsimile machine I used complied with California Rules of Court Rule 2003(3) and no error was reported by the machine.
- $\overline{\mathbf{x}}$ BY EMAIL: I sent such document by use of electronic mail to the above email address(es) on the date indicated above. (CCP § 1013(a)) Such document was scanned and emailed, without error, to such recipient whose e-address is indicated above pursuant to CCP § 1013(a); Service via § 102,114(i) of Board's Rules & Regs.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on December 29, 2011, at Cerritos, California.

Janice Yasuda

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